Supreme Court, U.S.
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98 903 DEC 1 - 1998
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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

MARILYN MINNS, individually and as parent and guardian of CASEY R. MINNS (infant); CASEY R. MINNS; DENISE BLAKE, individually and as parent and guardian of KATELYN L. BLAKE (infant); KATELYN L. BLAKE; KIMBERLY WALSH, individually and as parent and guardian of JENA WALSH (infant); JENA WALSH,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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51 pp

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED FOR REVIEW

1. Whether the doctrine of *Feres v. United States*, 340 U.S. 135 (1950) applies as an absolute bar to the claims of the spouses and children of military personnel for their own direct physical injuries, including birth defects, under the Federal Tort Claims Act (28 U.S.C. §§ 1346(b), 2671 *et seq.*) ("FTCA") where the injuries were also related to exposure of the military parent to toxic chemicals in connection with the Persian Gulf War.

2. Whether the claims of the spouses and children of military personnel under the FTCA are equally barred by the discretionary function exception to the FTCA (§ 2680(a)), even where they allege abuse of discretion and/or failure to follow established policies relating to administering untested and dangerous vaccines to military personnel, failure to warn the civilians of dangers, and the grossly negligent or reckless use and administration of pesticides and other toxic substances, without complying with applicable directions and procedures for use, or providing any warning of any danger of exposure.

3. Whether military spouses and minor children who suffered injury and damages as a result of otherwise compensable acts and omissions by the United States Government are virtually the only aggrieved class with no judicial or statutory remedy or rights?

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CITATIONS OF REPORTS OF THE OPINIONS BELOW

Minns v. United States, 974 F. Supp. 500 (D. Md. 1997), *aff'd, Minns v. United States*, 115 F.3d 445 (4th Cir. 1998). (Pet. App. A, 1a.)

BASIS FOR JURISDICTION

The judgment for which review is sought was entered September 2, 1998. This Court has jurisdiction to review the judgment of the Court of Appeals for the Fourth Circuit pursuant to 28 U.S.C. § 1254(1).

APPLICABLE STATUTORY PROVISIONS

The Federal Tort Claims Act

28 U.S.C. § 1346(b)(1)

Subject to the provisions of Chapter 171 of this title the District Courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on or after January 1, 1945, for injury, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office for employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 2680—Exceptions

The provisions of this Chapter [28 U.S.C.S. §§ 2671 *et seq.*] and Section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a state or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance with the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Government, whether or not the discretion involved be abused.

STATEMENT OF THE CASE

The Plaintiffs/Appellants in these three consolidated actions are the wives and minor children of servicemen who have suffered severe birth defects as a result of exposure, without warning, to, drugs, pesticides, and unreasonably dangerous and toxic products employed by the Defendant United States of America during the course of the children's fathers' military service. The birth defects are extremely severe and rare (one occurrence per 26,000 births, according to the *Encyclopedia of Birth Defects*, 1992 Ed.). Two of the minor Plaintiffs suffer from Goldenhars Syndrome, which includes asymmetric development of the face and body, imperfect ear development, asymmetric body development, internal fistulas, and numerous other problems.

The Complaints allege that the Defendant United States negligently exposed the Plaintiff mothers and children to the hazardous combination of products without warning, as well as exposing the father serving in the military during the Gulf War. Hence, the Complaints squarely allege direct injury to the non-service Plaintiffs as a result of the Defendant's conduct.

All of the appellants submitted their claims under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346(b), 2671-2680, to the Office of the Judge Advocate General at Fort Meade, Maryland. All of their claims were denied in February, 1996. Pet. App. C, 34-35a (the claim denial letter was virtually identical for all Petitioners, Pet. App. C is applicable to all). The Petitioners filed their Complaints in the United States Court for the District of Maryland in August, 1966 pursuant to the FTCA, § 1346(b) and 10 U.S.C. § 2733 (Military Claims Act).

The Complaints allege that the wives and children suffered injuries in the form of birth defects caused by their exposure to hazardous drugs, inoculations, pesticides and other toxic substances employed by the Respondent Gov-

ernment during the term of the fathers' military services at the time of the Persian Gulf War. The claims were consolidated before Judge Joseph H. Young, Senior District Judge. Prior to any discovery, the Government moved to dismiss the Complaints for lack of subject matter jurisdiction under the FTCA as arising out of an injury to service members incident to military service, as protected discretionary acts, as combatant activities and as barred because the claim arose in a foreign country.

The Petitioners opposed these contentions on the grounds that they alleged, as civilians, direct injury to themselves arising out of the conduct of the Defendant United States and that such claims are cognizable under the FTCA, notwithstanding the doctrine of *Feres v. United States*, 340 U.S. 135 (1940), which provides for the Government's sovereign immunity for injuries to servicemen arising out of activity incident to service. They also argued that the discretionary function exception is not applicable where negligence occurred at the non-policy operational level, in implementation of high level policy decisions, and where there is no room for independent judgment due to an already established policy, such as safety. The Petitioners urged that it is premature prior to discovery to determine where, by whom and under what constraints such decisions as caused the Plainitffs' injuries were made.

The trial court granted the Government's Motion to Dismiss on the grounds that the court lacked subject matter jurisdiction, Pet. App. B, 31a, *Minns v. United States*, 974 F. Supp. 500. The Court of Appeals for the Fourth Circuit affirmed his decision on substantially the same grounds. Pet. App. A, 2a-16a, *Minns v. United States*, 155 F.3d 445 (4th Cir. 1998). For the first time, the Fourth Circuit adopted the "genesis" test for evaluating that the *Feres* doctrine bars such derivative genetic injury claims. The panel held that even if the wives and children did suffer direct injury, their injuries had their "genesis"

in the barred claims of the servicemen fathers. Pet. App., 8a. The court also held that the discretionary function doctrine grants the Government immunity from such claims and that it also lacked jurisdiction to review the MCA claims. Pet. App., 15a. The court did not reach the issue whether the combatant activities or foreign countries exceptions to the FTCA apply because the foregoing determinations rendered resolution of that issue unnecessary. Pet. App., 15a.

Significantly, both the appellate and the district courts expressed their dissatisfaction with the unjust consequences of their rulings. "In reaching this decision, the Court is not without sympathy for the suffering of the minor Plaintiffs and their current lack of a remedy. . . ." Pet. App. B, 24a n.6; Pet. App. A, 16a ("Our rulings leave the wives and children of the three returning servicemen without a judicial remedy, even if their claims have merit.") The trial court quoted, with approval, the Third Circuit Court of Appeals in *Mondelli v. United States,* 711 F.2d 567, 569-70 (3d Cir. 1983), *cert. denied,* 465 U.S. 1021 (1984):

> We sense the injustice to the [the Plaintiff] of this result. Rarely does the law visit upon a child the consequences of actions attributed to the parents. Nevertheless the Supreme Court has construed the FTCA to subordinate the interests of children of service personnel to the exigencies of military discipline. Although these are delicate policy judgments, they are in the final analysis committed to Congress. Consequently, we conclude with reluctance, that the claims of [the Plaintiff] are barred.

Pet. App. B, 24a-25a n.6.

The trial court granted the defendant's Motion to Dismiss based solely upon the allegations in the Complaints. Hence the "facts" in this case are the allegations of the plaintiffs and all inferences most favorable to them, includ-

ing any facts which they might have been able to establish through the course of discovery, none of which took place.

The serviceman fathers were administered combinations of immunization agents, such as Pryridogstigmine Bromide (P.B.), anthrax vaccine, and botulinum toxoid, without prior or subsequent warning that these agents were experimental as administered, in that they had either never been tested and approved on humans or, as with P.B., pills not tested on a normal human population. They were investigational drugs, as used.

Questions of quality control are also relevant, in that some of these agents may have been contaminated, due to improper storage and/or lack of quality control or testing. Petitioners also alleged that the manner in which pesticides were sprayed, without regard to manufacturers' instructions, resulted in overexposure to toxic substances.

The Petitioners also alleged that they suffered their injuries as a result of direct exposure to, and contact with the hazardous products the Government employed. The wives and children do not even allege that the serviceman fathers suffered injury, or that any injury they may have suffered was the same as the injuries to the Plaintiffs. Among the possibilities which the Appellants could establish after completion of discovery, are that the Petitioners' injuries resulted from contamination following direct contact with the spouse, or his clothing. Their injuries may have resulted from toxic substances, such as Dursban, passing into the mothers' system via semen, stored in fat cells and later released to cause damage in fetal development.

REASONS FOR ALLOWANCE OF THE WRIT

The Petitioners believe that the United States Court of Appeals has decided an important question of federal law that has not been, but should be settled by this Court. The issue whether the spouses and children of Gulf War, indeed all military personnel, are barred as a matter of law from any recovery for injuries they suffered as a result of the government's culpable conduct is important for many reasons.

First, it is fundamentally unfair that only these, of all citizens, should be deprived of any recourse for such significant, indeed catastrophic injuries. Second, the magnitude of the problem is extensive, potentially affecting thousands of spouses and children for their entire lives at a cost of millions of dollars. Third, unless fully and finally resolved by the Court, these identical issues will be raised again and again in the courts below, and by petition to this Court. *See Clark v. United States,* 116 F.3d 476 (5th Cir. 1997), *aff'g* 974 F. Supp. 895 (E.D. Tex. 1996), *cert. denied,* 118 S. Ct. 625 (1997). The allegations of *Clark,* as evidenced by the rather perfunctory analysis of the issues by the District Judge in Texas, were more narrow and limited than those raised in these Complaints, and the arguments raised, as addressed by that court, apparently were more limited than here. *Compare* the detailed analysis of the Maryland District Judge and the panel of the Fourth Circuit Court of Appeals (Pet. App. A and B) with the short shrift given to Clark's arguments by the Texas District Court, 974 F. Supp. 895, and the affirmation without comment of the Fifth Circuit Court of Appeals. This Court is the appropriate forum for defining the scope and limits of the *Feres* doctrine under circumstances such as these and for providing appropriate guidance as to the factors to be weighed, and the relative significance of each such factor, particularly the absence of any remedy.

Finally, the Court should note that this problem of birth defects related to the Gulf War has received widespread publicity, and has caused great concern, and even some unrest, among the general public, and certainly those affected by this misfortune. The absence of any recourse can only contribute to this ongoing sense of disaffection.

I. *FERES* DOCTRINE

The FTCA provides, in general, that the United States shall be liable for tort claims in a manner similar to that of a "private individual under like circumstances," 28 U.S.C. § 2674. Nonetheless, this overbroad construction of the *Feres* doctrine places these Petitioners in the anomalous position of having no remedy or recourse because they have the misfortune to be the wives and children of military personnel. Even the military member of the family is entitled to some form of statutory compensation for any injury he might sustain in the line of duty, even if he cannot sue the government in tort. It is incomprehensible that virtually the only class of wrongfully damaged individuals in this society denied any right to seek damages for their injuries is comprised of those who suffer most—and deserve more—the spouses and deformed minor children of service personnel injured as a consequence of that service.

The courts below erred in holding that the *Feres* doctrine bars claims by civilians, without other remedy, for their own direct injuries arising out of their own direct exposure to toxic agents, even if caused by the culpable conduct of the Government. The appropriate standard for determining whether a claim is barred under *Feres* is a three-prong balancing test. *Feres*, 340 U.S. at 143. The balance weighs heavily for the Petitioners in that: (1) they have no other remedies; (2) they have no distinctive relationship with the United States Government; and (3) the effect upon military discipline and morale

would be minimal at worst, particularly with respect to post-war warnings.

It is clear that under *Feres* and its progeny, *e.g., Stencel Aero Engineering Corp. v. United States,* 431 U.S. 666 (1977), that the civilian family member of the service person may not maintain a claim for direct injuries to the service person incident to that service, *e.g., De Font v. United States,* 453 F.2d 1239 (1st Cir.), *cert. denied,* 407 U.S. 910 (1972) (denying claim of wife for wrongful death of husband where husband would have been barred by *Feres* had he survived). However, it is equally clear that *Feres* does not bar the claims of civilian Plaintiffs for their own independent injuries, even where military family members would be barred by *Feres* from pursuing their own claims arising out of the same incident, *e.g. Orken v. United States,* 239 F.2d 850 (6th Cir. 1956). In *Orken* the court permitted claims of civilian family members of an officer killed when an Air Force plane crashed into their living quarters, while barring the related claim of the officer himself even though it arose out of the same incident. Indeed, in *Orken,* the civilian and military injuries were similar and arose out of a common occurrence, with the only significant distinction the military or civilian status of the injured parties.

The Court of Appeals for the Fourth Circuit recognized this latter principle in *Romero v. U.S.,* 954 F.2d 223 (4th Cir. 1992), *proceedings after remand,* 806 F. Supp. 569 (E.D. Va. 1992), *aff'd without published opinion,* 2 F.3d 1149 (4th Cir. 1993). There, the Court held that the claims of negligent prenatal care administered to the pregnant active duty military mother by Government medical employees was not barred by *Feres* because "we believe the precedent governing injuries by the military to civilians applies here. The civilian child was injured, not a military patient," 954 F.2d 223. Similar results were reached in other cases involving injury to a military child in the medical malpractice context. *Del*

Rio v. United States, 833 F.2d 282 (11th Cir. 1987); *Atkinson v. United States,* 825 F.2d 202 (9th Cir. 1987), *cert. denied,* 485 U.S. 987 (1988).

The *Del Rio* case is particularly instructive because in that case the pregnant mother was also injured in the course of the negligent treatment that led to the loss of her twin children. The claims of the children were based upon the allegations that the military mother did not receive proper prenatal treatment due to a pre-existing condition. Nonetheless, although her claims were barred, those of her children were not. The Fourth Circuit Panel in *Romero* expressly found the reasoning of the Ninth Circuit in *Atkinson* "persuasive when the Plaintiff is a civilian child." 954 F.2d 227 n.6. Here, both the Petitioner mothers and children are civilians, and their claims must be allowed to proceed.

II. DISCRETIONARY FUNCTION EXCEPTION

The discretionary function exception, 28 U.S.C. § 2680(a) is also not applicable where the Appellants have alleged that their injuries occurred through non-conforming batches of inoculant, the failure of the Government to follow its own policies and standards with respect to warnings and the use of pesticides, and where pesticides were sprayed in disregard of directions and instructions for safe use. *See Berkovitz v. United States,* 486 U.S. 531 (1988). The appeals court below concluded that:

> Even if the military used investigational, worn out or defective drugs that had been stored too long, someone in the military nevertheless made the decision to use them, and that decision, with all its alleged flaws, amounted to a judgment that the risk of using these drugs was less than the risk of exposing unprotected soldiers to potential biological and chemical attack.

Pet. App. A, 13a.

That conclusion, without facts and context, is too extreme. For example, in the event that there were in effect policies and procedures against, or to prevent such administration and use of defective drugs, or the reckless administration of pesticides, and the innocent wives and children of the exposed fathers were injured as a result of pure negligence or recklessness in violation of those policies and procedures, without any knowledge or consideration of the risks and potential benefits of such use, there must be a judicial remedy.

These allegations, if established, would place this case within the parameters of *Dube v. Pittsburgh Corning*, 870 F.2d 790, 799 (1st Cir. 1989) in which the Navy's negligent failure to warn of asbestos hazards was not a discretionary policy decision protected by the discretionary function exception. The *Dube* case would particularly apply were the plaintiffs to establish that the Department of Defense had established a policy, by its agreement with the FDA, to warn of the risks of its use of investigative drugs, and that lower level staff, who did not have discretion in the matter, breached that policy. Similarly, in *Griffin v. United States*, 500 F.2d 1059 at 1066 (3rd Cir. 1974) the court held that:

> Where the conduct of Government employees in implementing agency scientific evaluation and not the formulation of policy, we do not believe that the conduct is immunized from judicial review as a 'discretionary function'.

The purchase and use of immunizing agents and pesticides without testing and quality control, and improper storage, implicates this principle of safety, as does the manner and use of pesticides without following the manufacturers' directions. *See Moyer v. Martin Marietta Corp.*, 481 F.2d 585 (5th Cir. 1973) (refusing to apply discretionary exception to procurement decision regarding faulty ejection seat mechanism in B-57, but not to decision to procure B-57).

CONCLUSION

For the reasons set forth above, the decision of the court below affirming dismissal of the Petitioners' Complaints should be reversed and remanded to the United States District Court for the District of Maryland for discovery. In the alternative, Appellants request that these cases be remanded to the Department of the Air Force for reconsideration of the administrative claims pursuant to the Federal Tort Claims Act.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 97-2234

MARILYN MINNS, individually and as parent and guardian of Casey R. Minns (infant); CASEY R. MINNS; KIMBERLY WALSH, individually and as parent and guardian of Jena Walsh (infant); JENA WALSH; DENISE BLAKE, individually and as parent and guardian of Katelyn Blake (infant); KATELYN BLAKE,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court
for the District of Maryland, at Baltimore
Joseph H. Young, Senior District Judge
(CA-96-2504-Y, CA-96-2505-Y, CA-96-2506-Y)

Argued: May 5, 1998
Decided: September 2, 1998

Before NIEMEYER and WILLIAMS, Circuit Judges, and HOWARD, United States District Judge for the Eastern District of North Carolina, sitting by designation.

OPINION

NIEMEYER, Circuit Judge:

In preparation for Operation Desert Storm and the Persian Gulf War, the United States military innoculated its servicemen and exposed them to toxins and pesticides in anticipation of possible biological and chemical attacks by Iraq. The wives and children of three servicemen claim in this case that the military negligently administered and used "investigational" and defective drugs on the three servicemen, causing their children, who were born after the War, serious birth defects.

After the Judge Advocate General of the Air Force through delegated authority, *see* 32 C.F.R. § 842.42, disallowed their claims made under the Military Claims Act, 10 U.S.C. § 2731 *et seq.*, the wives and children filed these actions against the United States both to review the Judge Advocate General's decisions and to assert independent negligence claims under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671 *et seq.* The district court ruled that it did not have jurisdiction to review the decisions of the Judge Advocate General and that exceptions to the Federal Tort Claims Act, as well as the doctrine stated in *Feres v. United States,* 340 U.S. 135 (1950), applied to exclude their claims under that Act.

Because the Constitution grants to Congress and not to the judiciary "plenary control over rights, duties, and responsibilities in the framework of the Military Establishment," *Chappell v. Wallace,* 462 U.S. 296, 301 (1983), and Congress has not relinquished this control to the judiciary, we affirm the district court's order dismissing these cases. But our decision nonetheless invites Congress to review these claims in the context of ongoing scientific studies to assure that justice is accomplished for our returning veterans and their families.

I

Sergeant Brad Minns of the U.S. Army, Chief Petty Officer Brian Walsh of the U.S. Navy, and Private Paul F. Blake of the U.S. Army are veterans of the Persian Gulf War which was fought in 1991. In preparation for the War, they were inoculated with drugs and exposed to pesticides by the military in anticipation of possible biological and chemical attacks by Iraq.

Following the war, each serviceman returned to his wife and fathered a child who was born with serious birth defects. All three children suffer from Goldenhar's Syndrome, a rare birth defect producing deformity, including asymmetry of the face and body, a partially developed or lopsided ear, internal fistulas, and, in some cases including these children, esophageal malformations and the absence of an anal opening. The families of these children recognize that scientific studies about the effects of the administered drugs and pesticides are in process and will not be concluded until later in 1998 or in 1999. Based on preliminary results from some studies, however, they believe that the toxins to which the servicemen were exposed were possibly stored in the servicemen's semen and passed on to their wives, where the toxins were stored in fatty tissue and ultimately were released during pregnancy to the fetus. The deformed children were born from one to two-and-one-half years after the servicemen were exposed to the toxins and pesticides.

The wives and children presented claims for damages to the Office of the Judge Advocate General under the Military Claims Act, 10 U.S.C. § 2731 *et seq.* After the Judge Advocate General disallowed their claims, they filed these actions to review the Judge Advocate General's decisions and to assert claims under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671 *et seq.*

In substantially similar complaints, the wives and children of these three returning servicemen allege that the

United States "negligently administered [to the servicemen] a course of immunizations" and "negligently exposed [the servicemen] to a variety of unreasonably dangerous, toxic pesticides." The complaints state that the military "failed to supervise, direct and implement the use and exposure of their products," which were "hazardous, unreasonably dangerous, [and] defective." They further allege that the products were used "without proper testing, approval, warnings and directions." Each mother and child demands $20 million in damages as a result of the United States' negligence.

The United States filed a motion to dismiss these complaints under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction, and the district court granted the motion, ruling that the *Feres* doctrine, as stated in *Feres v. United States*, 340 U.S. 135, 146 (1950), and the "discretionary function" exception to the Federal Tort Claims Act barred plaintiffs' negligence claims under that Act and that the courts have no authority to review administrative decisions under the Military Claims Act. These appeals followed.

II

Through enactment in 1948 of the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671 *et seq.*, Congress waived the sovereign immunity of the United States for certain torts that otherwise could be proved against it. The FTCA did not create new causes of action but merely accepted liability against the United States for circumstances that otherwise "would bring private liability into existence." *Feres*, 340 U.S. at 141. Indeed, the FTCA expressly states that the United States is liable for tort claims "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674.

Relying on this operation of the FTCA, the Supreme Court concluded in *Feres* that even after enactment of that Act, servicemen could not sue the government because "[w]e know of no American law which ever has permitted a soldier to recover for negligence, against either his superior officers or the Government he is serving." 340 U.S. at 141 (footnote omitted). The Court summarized, "[The Act's] effect is to waive immunity from recognized causes of action and was not to visit the Government with novel and unprecedented liabilities." *Id.* at 142. On this basis, the *Feres* doctrine, thus established, holds precisely that under preexisting law servicemen could not sue fellow servicemen or the government "for injuries to servicemen where the injuries arise out of or are in the course of activity incident to [military] service," *id.* at 146, and that the FTCA did not create or imply such liability.

The wives and children of the three servicemen involved in this case do not attempt to take issue with the conclusion that under the *Feres* doctrine the three servicemen do not have claims against the government for damages under the FTCA. But they argue that, as wives and children of servicemen, they are not barred from processing a claim under the FTCA based on the United States' negligent acts directed *at them*. They observe that if they are not allowed to prosecute their tort claims under the FTCA, they have no remedy at all for their damages. To address their argument, we must first examine the scope of the *Feres* doctrine.

While justifications for the *Feres* doctrine include the fact that compensation is provided to servicemen through a no fault comprehensive benefit scheme and the fact that a serviceman's relationship to the government is a "distinctively federal" one, *Stencel v. Aero Eng'g Corp.*, 431 U.S. 666, 671 (1977), its principal justification focuses on the unique relationship between the government and its military personnel:

> Although the Court in *Feres* based its decision on several grounds, in the last analysis, *Feres* seems best explained by the peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty.

United States v. Shearer, 473 U.S. 52, 57 (1985) (Internal quotation marks and citations omitted). The military has a unique need to operate under special regulations and rules of order to ensure "unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel." *Chappell*, 462 U.S. at 304. This discipline "would be undermined by a judicially created remedy exposing officers to personal liability at the hands of those they are charged to command. *Id.* Accordingly, consistent with the structure created by the Constitution, which leaves control of the military to the Legislative and Executive Branches, *see* U.S. Const. art. I, § 8, art. II, § 2, "Congress has created, and [the Supreme] Court has long recognized two systems of justice, to some extent parallel: one for civilians and one for military personnel." *Chappell*, 462 U.S. at 303-04. "It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible—as the judicial branch is not—to the electoral process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence." *Id.* at 302 (quoting *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973)). Thus, even where a judicial action does not "contest the wisdom of broad military policy," the *Feres* doctrine requires courts to reject actions which are "the *type* of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at

the expense of military discipline and effectiveness." *Shearer*, 473 U.S. at 59. If a suit requires deep inquiry into military decisions or would strongly impact military discipline, the *Feres* doctrine will bar it.

These considerations that prohibit servicemen's suits against the government also prompt the extension of the *Feres* doctrine to prohibit non-servicemen's suits against the government which are derivative of or ancillary to servicemen's injuries. *See Kendrick v. United States*, 877 F.2d 1201, 1206-07 (4th Cir. 1989) (holding that *Feres* doctrine is "equally applicable" to family member claims "derivative" of a service member's injuries); *Gaspard v. United States*, 713 F.2d 1097, 1102 (5th Cir. 1983) ("Courts . . . have widely ruled that FTCA relief is not available to family members for claims based on the injuries to their relatives in the armed forces. . . . This is true even when the claims of the family members are independent of the serviceman's cause of action" (citing cases)). The reason for this extension is clear. Because such non-servicemen's suits would require courts to engage in exactly the same intrusion into military decisions as would servicemen's suits, such as by requiring military personnel to testify against their commanding officers, they would pose almost as many problems—judicially and militarily—as would a serviceman's suit over the same issue. *See id.* at 1102.

For this reason, most courts have adopted a "genesis" test for evaluating whether the *Feres* doctrine applies to derivative genetic injury claims of servicemen's children based on governmental negligence in exposing the serviceman to dangerous substances. *See, e.g., Hinkie v. United States*, 715 F.2d 96, 98-99 (3d Cir. 1983); *Lombard v. United States*, 690 F.2d 215, 223-24 (D.C. Cir. 1982); *Monaco v. United States*, 661 F.2d 129, 133 (9th Cir. 1981). Under this test, if a non-servicemen's injury finds its "genesis" in the injury suffered by a serviceman incident to service, then the *Feres* doctrine bars the non-

serviceman's suit. *See, e.g., Hinkie,* 715 F.2d at 98-99. Stated otherwise, if the non-serviceman's suit is based on essentially the same facts as the potential serviceman's suit or the non-serviceman's suit could not have happened "but for" the serviceman's cause of action, then under the genesis principle the *Feres* doctrine precludes the suit. *See, e.g., Gastard,* 713 F.2d at 1102; *Lombard,* 690 F.2d at 223-24.

Until now, we have not had occasion to address the merits of this test. In *Romero v. United States,* 954 F.2d 223 (4th Cir. 1992), we did permit a suit to proceed against the United States based on an infant's injury caused by a military doctor's failure to undertake specified pre-natal procedures. We observed, however, that because the purpose of the failed treatment "was to insure the health *of a civilian," id.* at 225 (emphasis added), and the government owed an affirmative duty of care "directly" to the civilian, *id.* at 226, the genesis test did not apply. We recognized, however, that the test might nevertheless bar a derivative injury claim where a "civilian injury . . . *derives from* a service-related injury to a service person," such as occurs when service members are exposed to radiation or Agent Orange resulting in later injury to a fetus or infant. *Id.* (emphasis added).

Because the genesis test well accords with the primary purpose of the *Feres* doctrine and is applicable to factual circumstances similar to those presented in this case, we now join the other circuits which have adopted it as their test for evaluating tort claims of non-military personnel that derive from servicemen's relationships with the government.

Turning to the circumstances before us, the military decided to inoculate its servicemen, including the three servicemen involved in this case, and to expose them to drugs and pesticides in anticipation of possible biological and chemical attacks by Iraq. Even if the military had

been negligent in carrying out this program, the families of the servicemen agree that the *Feres* doctrine prevents the servicemen themselves from suing the United States under the FTCA. They maintain, however, that because they are wives and children of servicemen, not servicemen themselves, their claims are not barred by *Feres.* But they overlook the fact that, in advancing their own negligence suits, they rely upon the same negligent acts that allegedly impacted the servicemen.

Under the chain of causation that these wives and children assert, the military's negligence in implementing and administering the inoculation program to the servicemen resulted in making them carriers of the toxins to their wives and ultimately to their newborn children. This negligence in implementing and administrating the program to the servicemen thus was the "genesis" and the "but for" cause of the injuries to the wives and children. To establish the liability of the United States, the wives and children would have to challenge the decisions and acts of military personnel in preparing for war, and their suits would thus entail second-guessing decisions and acts that were indisputably "incident to military service." If allowed to proceed, their suits would place the courts in exactly the position that the *Feres* doctrine was designed to avoid.

The wives and children have attempted to bypass this straightforward application of the *Feres* doctrine in several ways. First, they point out that they have not alleged that the servicemen were injured, arguing that the only injury alleged occurred *to themselves.* But the omission of this allegation is not critical to the *Feres* analysis. "[T]he focus of *Feres* is not upon when the injury occurs or when the claim becomes actionable, rather it is concerned with *when and under what circumstances the negligent act* occurs." *Kendrick,* 877 F.2d at 1203 (emphasis added). "Whether [the plaintiff's] injury 'occurred' when [they were] born with a birth defect or when

[their] father[s] suffered chromosomal change, the allegedly negligent act drawn into question was performed while [the servicemen were] in the service," *Monaco*, 661 F.2d at 133. Thus, the inquiry must focus on whether the negligent act is the basis for the "*type* of claim[] that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness." *Shearer*, 473 U.S. at 59. We conclude that the plaintiffs cannot escape the fact that the negligent acts alleged in their complaint find their basis in the military's decision to inoculate its soldiers with drugs and to expose them to pesticides, and the issue of whether they can allege or demonstrate injury is irrelevant to the analysis. *See, e.g., Monaco*, 661 F.2d at 134 (holding that the fact that a plaintiff may seek relief from injury not based on the injury of the serviceman "does not change the substantive analysis [because] the court must still examine the Government's activity in relation to military personnel on active duty").

The plaintiffs also argue that the operative relationship is the contact *they* had with the dangerous products and that because they were not in the service, their injuries were not incident to military service. But this allegation still does not alter the outcome derived from applying the genesis test. The plaintiffs' exposure to the chemicals occurred because the servicemen first and necessarily were exposed. Because the servicemen's exposure to the chemicals is the genesis of the plaintiffs' alleged contact with the chemicals, *Feres* bars the claims.

The plaintiffs make a separate argument that the government's failure to warn was an independent act of negligence which was not derivative of servicemen's claims but which directly affected the plaintiffs. Similarly, however, this allegation arises out of the general failure to warn about the risks associated with a military decision made to protect soldiers during an impending war. Questioning the military's decision not to warn either the

soldiers or their families about the possible risks of inoculation or exposure to pesticides would again create the court-intrusion problem that the *Feres* doctrine aims to avoid. Courts would be questioning strategies, defense preparations, and the military's control of information, contrary to their authority. *See, e.g., Persons v. United States,* 925 F.2d 292, 296-97 (9th Cir. 1991); *Heilman v. United States,* 731 F.2d 1104, 1107-09 (3d Cir. 1984).

Finally, the plaintiffs argue that some of the underlying rationales for the *Feres* doctrine do not apply to them. They note, for example, that as wives and children they do not have a distinctively federal relationship to the government nor do they have an effective remedy for their claims under present law, and thus that two justifications for the *Feres* doctrine are not relevant in their case. Even so, the plaintiffs cannot avoid the fatal consequence that their suits would require the judiciary to enmesh itself deeply into military decisions, a consequence that implicates the primary justification for the *Feres* doctrine.

Because the wives' and children's claims against the United States are derivative of the military's alleged negligent acts directed at its servicemen, the *Feres* doctrine, applied through the genesis test, bars them.

III

Even were the *Feres* doctrine not determinative of the United States' liability to the wives and children in this case, the wives and children would still have to demonstrate that they did not fall within any of the several exceptions to recovery under the Federal Tort Claims Act. The first of these exceptions states that sovereign immunity is not waived for "[a]ny claim based upon an act or omission of an employee of the Government . . . based upon the exercise or performance or the failure to exercise or perform a *discretionary function or duty* on the

part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a) (emphasis added). Plaintiffs argue that the discretionary function exception does not apply because they are alleging the negligent administration of a decision and a negligent failure to warn. They are adamant in pointing out that they are not alleging negligent policy choices.

Although Congress did not expressly define what it meant by the term "discretionary function," the Supreme Court has explained that with the discretionary function exception, "Congress wished to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *United States v. Varig Airlines*, 467 U.S. 797, 814 (1984). Thus, when governmental conduct (1) is the product of choice or is a judgment and (2) is "based on considerations of public policy," it becomes a discretionary act shielded from tort liability. *See Berkovitz v. United States*, 486 U.S. 531, 536-37 (1988); *Williams v. United States*, 50 F.3d 299, 309 (4th Cir. 1995); *see also United States v. Gaubert*, 499 U.S. 315, 324-25 (1991). On the other hand, if governmental conduct is prescribed by federal statute, regulation, or policy, the discretionary function exception does not apply because "the employee has no rightful option but to adhere to the directive." *Berkovitz*, 486 U.S. at 536.

We should note that when discretionary decisions are ones of professional military discretion, they are due the courts' highest deference. *See Tiffany v. United States*, 931 F.2d 271, 277 (4th Cir. 1991) ("Of the legion of governmental endeavors, perhaps the most clearly marked for judicial deference are provisions for national security and defense"). And the "complex, subtle, and professional decisions" of how to protect American soldiers in

time of war and how to administer such protection are decisions that are "essentially professional military judgments," overseen by the Legislative and Executive Branches. *Id.* at 278 (quoting *Gilligan*, 413 U.S. at 10).

In applying these principles to the facts of the complaint, we must address three discrete aspects of the plaintiffs' negligence allegations. First, the plaintiffs allege that the United States was negligent in *administering* the inoculations and pesticides, principally by using "investigational" drugs, long-stored drugs, defective drugs, or hazardous combinations of drugs. They are careful to note that they are not challenging the underlying policy decisions to use the drugs, maintaining that the "operational" decisions of administering drugs are not protected in the same way that "planning" decisions are. Second, the plaintiffs allege that the United States was negligent in *providing inadequate warning* about the drugs. And finally, they allege that the military *lacked governmental authority* to make its exposure decisions.

On the first aspect of the negligence alleged, we conclude that the plaintiffs' attempts to distinguish, through semantic refinement, between decisionmaking and administrative conduct, as well as between "operational" and "planning" decisions, do not withstand scrutiny in the circumstances of this case. Even if the military used investigational, worn out, or defective drugs that had been stored too long, someone in the military nevertheless made the decision to use them, and that decision, with all its alleged flaws, amounted to a judgment that the risk of using these drugs was less than the risk of exposing unprotected soldiers to potential biological and chemical attack. Not only did that decision lead to the use of drugs and pesticides but it also included the decision to use the particular drugs available and in the combinations that were thought necessary to accomplish the intended objective. However this aspect of the negligence claim is char-

acterized, it aims directly at the military's decisions to use these particular drugs in the context of given knowledge and risks. Nothing could be closer to the core of discretion as defined in *Berkovitz* and *Varig*.

The plaintiffs' efforts to distinguish between "operational" decisions and "planning" decisions are also not useful to them because the Supreme Court has rejected making a distinction on this basis. In *Gaubert*, the Court explained that "[a] discretionary act is one that involves choice or judgment; there is nothing in that description that refers exclusively to policy-making or planning functions." *Gaubert*, 499 U.S. at 325. Rather, decisions that take place in the administration of a policy decision are also protected—even if an abuse of discretion—so long as they are judgments based on policy considerations. *Id.* at 326.

On the second aspect of the plaintiffs' negligence claims, involving a failure to warn, the decision whether to warn soldiers and their families of the potential effects of inoculations and pesticides also amounted to a judgment call. The decision whether to warn about the effects of inoculations and pesticides implicates other military decisions such as whether to risk alerting the enemy about war preparations and whether to give a warning that might be harmful to cohesion, particularly when the decision had already been made to use the drugs. This decision falls equally at the core of the discretionary functions exception. As the Seventh Circuit has noted, the decision to warn is "replete with choices" and requires "ascertaining the need for a warning and its cost," determining the group to be alerted, as well as the content and procedure of such notice," and ultimately, "balanc[ing] safety with economic concerns." *Maas v. United States*, 94 F.3d 291, 297 (7th Cir. 1996); *see also Williams*, 50 F.3d at 310; *In re Agent Orange*, 818 F.2d 194, 200-01 (2d Cir. 1987) (holding that a failure to warn is a discretionary

function and that "[t]he very paucity of proof concerning the possible deleterious effects of Agent Orange made the decision whether to issue a nationwide health warning even more clearly an exercise of discretion"). *But see Dube v. Pittsburgh Corning*, 870 F.2d 790, 798-800 (1st Cir. 1989) (holding that a failure to warn was not a policy judgment).

Finally, on the third aspect, which alleged a lack of authority to administer the inoculation program, the plaintiffs have pointed to no statute or regulation that limits the military's authority to make these policy decisions. Without such a limitation, the military's decisions are necessarily discretionary.

Because we find that the discretionary function exception in the Federal Tort Claims Act bars the plaintiffs' suits, we need not consider the other exceptions of the Federal Tort Claims Act raised by the United States, namely, that the decisions involved "combatant activities" and that the negligence occurred in a "foreign country." *See* 28 U.S.C. § 2680(j), (k).

IV

Finally, the plaintiffs seek judicial review of the Judge Advocate General's decision disallowing their claims under the Military Claims Act, 10 U.S.C. § 2731 *et seq.* They urge that we remand these cases to the Office of the Judge Advocate General to await completion of the pending studies on the effects of the Gulf War inoculations and pesticides. Unfortunately for the plaintiffs, however, the Military Claims Act does not provide for judicial review of the Judge Advocate General's decisions. Rather, it provides, "Notwithstanding any other provision of law, the settlement of a claim under section 2733 . . . is *final and conclusive*." 10 U.S.C. § 2735 (emphasis added). The Act defines "settle" to mean "consider, ascertain, adjust, determine, and dispose of a claim, whether by full or partial allowance or by disallowance." 10 U.S.C. § 2731.

We believe that when Congress provided that the decisions of the Judge Advocate General are "final and conclusive," it placed final discretion over military claims with the military and not with the courts. All of the circuits which have interpreted these provisions agree, concluding that the "final and conclusive" language of § 2735 bars judicial review in all but cases of constitutional error. *See Collins v. United States*, 67 F.3d 284, 286-88 (Fed. Cir. 1995); *Schneider v. United States*, 27 F.3d 1327, 1331-32 (8th Cir. 1994); *Hata v. United States*, 23 F.3d 230, 232-33 (9th Cir. 1994); *Rodrigue v. United States*, 968 F.2d 1430, 1432-34 (1st Cir. 1992); *Poindexter v. United States*, 777 F.2d 231, 233-37 (5th Cir. 1985); *Broadnax v. United States Army*, 710 F.2d 865, 867 (D.C. Cir. 1983) (barring judicial review except in limited circumstances); *Labash v. United States Dep't of Army*, 668 F.2d 1153, 1155-56 (10th Cir. 1982). Because the plaintiffs assert no question of constitutional magnitude, we must affirm the court's dismissal of the plaintiffs' claims under the Military Claims Act.

V

Our rulings in these cases leave the wives and children of the three returning servicemen without a judicial remedy, even if their claims have merit. As the plaintiffs readily acknowledge, scientific studies have not yet demonstrated the necessary causal link between the servicemen's inoculations and pesticide exposure and their children's birth defects. If scientists are able to demonstrate that this link exists, the matter might become an appropriate one for the serious consideration of Congress. Congress has a long history of providing warranted relief for the impact of military service on veterans and their families, and to remedy the service-related injuries of our veterans and their families is a proper and noble function of the Legislative Branch. *See Chappell*, 462 U.S. at 302.

AFFIRMED

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil No. Y-96-2504
(Consolidated) Civil No. Y-96-2505,
Civil No. Y-95-2506

MARILYN MINNS, *et al.*

v.

UNITED STATES OF AMERICA;

KIMBERLY WALSH, *et al.*

v.

UNITED STATES OF AMERICA;

DENISE BLAKE, *et al.*

v.

UNITED STATES OF AMERICA

August 8, 1997, Decided

Joseph H. Young, Senior United States District Judge.

Opinion by: Joseph H. Young.

MEMORANDUM OPINION

I. Facts

The three consolidated cases pending before the Court were brought by the wives and minor children of servicemen involved in the Persian Gulf War. Plaintiffs allege that the minor children were afflicted with severe birth

defects [1] caused by the exposure, without warning, of the servicemen to drugs,[2] pesticides,[3] and other unreasonably dangerous and toxic products used by the United States during the Persian Gulf War.

Plaintiffs seek damages of $20 million each from the United States under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671-80, and the Military Claims Act ("MCA"), 10 U.S.C. §§ 2731-38, alleging that the United States negligently exposed the mothers and minor children to the hazardous combination of products without warning.

The United States filed a Motion to Dismiss for lack of subject matter jurisdiction. FED. R. CIV. P. 12(b)(1). The United States argues that Plaintiffs' FTCA claims are barred under *Feres v. United States*, 340 U.S. 135, 146, 95 L. Ed. 152, 71 S. Ct. 153 (1940), as well as the exceptions to the FTCA for discretionary functions, combat activities, and activities in a foreign country. 28 U.S.C. § 2680(a), (j), (k). With respect to the MCA claims, the United States argues that the decision to award benefits under the MCA is not subject to judicial review. Finally, the United States challenges the venue of one of the consolidated cases.

Plaintiffs oppose the Motion to Dismiss. Having been fully briefed and a hearing held, the motion is ripe for resolution.

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[1] The birth defects suffered by the minor Plaintiffs include asymmetric development of the face and body, imperfect ear development and hearing loss, internal fistulas, absence of anus, kidney problems, bowel problems, and lung and respiratory problems. (Minns Compl. P 8, Walsh Compl. P8, Blake Compl. P8).

[2] The drugs involved include pyridostigmine bromide, botulinum toxoid vaccine, gamma globulin, and anthrax vaccine.

[3] The pesticides involved include chlorpyrifos or Dursban, diethyltoluamide or DEET, and prometherine.

II. FTCA Claims

A. *Feres* Doctrine.

The Federal Tort Claims Act ("FTCA") provides, with some exceptions, that the United States shall be liable for tort claims "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. The Supreme Court has consistently held that the FTCA does not waive the sovereign immunity of the United States "where the injuries arise out of or are in the course of activity incident to service." *Feres v. United States,* 340 U.S. 135, 146, 95 L. Ed. 152, 71 S. Ct. 153 (1940); *see also United States v. Johnson,* 481 U.S. 681, 95 L. Ed. 648, 107 S. Ct. 2063 (1987); *United States v. Stanley,* 483 U.S. 669, 97 L. Ed. 2d 550, 107 S. Ct. 3054 (1987); *United States v. Shearer,* 473 U.S. 52, 87 L. Ed. 2d 38, 105 S. Ct. 3039 (1985); *Chappell v. Wallace,* 462 U.S. 296, 76 L. Ed. 2d 586, 103 S. Ct. 2362 (1983); *Stencel Aero Eng'g Corp. v. United States,* 431 U.S. 666, 52 L. Ed. 2d 665, 97 S. Ct. 2054 (1977).

Three factors underlie the *Feres* doctrine: (1) the "distinctively federal" relationship between a soldier and his superiors; (2) the existence of statutory death and disability benefits that are available to service-members without the need for litigation or proof of fault by the military; and (3) the need to preserve military discipline and avoid judicial second-guessing of military decisions. *Feres,* 340 U.S. at 143; *Johnson,* 481 U.S. at 688-91.

Plaintiffs urge the Court to apply a balancing test that weighs each factor equally. Applying this test, Plaintiffs contend that the *Feres* doctrine should not bar their claims because (1) there is no distinctively federal relationship between civilian family members and the military; (2) there are no statutory benefits available to civilian family members; and (3) military discipline would not be seriously threatened by the provision of a warning to civilian family members.

The Supreme Court has stated that the factors underlying the *Feres* doctrine do not constitute a bright-line test and are not to be mechanically analyzed for their presence in an individual case. *Shearer*, 473 U.S. at 57. Instead, courts are to look to whether the injuries complained of "arise out of or are in the course of activity incident to [military] service." *Feres*, 340 U.S. at 146; *Hass v. United States*, 518 F.2d 1138, 1140-41 (4th Cir. 1975). The Supreme Court has emphasized that the paramount goal of the *Feres* doctrine is to avoid the potential for a "civilian court to second-guess military decisions." *Shearer*, 473 U.S. at 57; *Stencel Aero*, 431 U.S. at 673.

It is beyond dispute that the servicemen, who are husbands and fathers to Plaintiffs, may not maintain FTCA suits against the United States for any injuries they sustained from their exposure to drugs, pesticides, and other unreasonably dangerous and toxic products during their military service in the Persian Gulf War. The *Feres* doctrine prohibits such suits for injuries incident to military service because civilian courts would be allowed to second guess the judgment of the military in exposing servicemen to drugs, pesticides, and other unreasonably dangerous and toxic products.

The *Feres* doctrine precludes not only suits for injuries sustained by the servicemen themselves but also claims by third parties that have their genesis in an injury to a serviceman which was incident to his military service. For example, wrongful death suits by family members on behalf of military personnel who died incident to service are barred. *See Feres*, 340 U.S. at 136-37 (involving suit brought by executrix). Similarly, claims by widows and children of servicemen for loss of consortium, companionship, and support are barred. *See, e.g., Kendrick v. United States*, 877 F.2d 1201, 1206-07 (4th Cir. 1989) (rejecting claim by Army sergeant's son for loss of parental consortium); *Schoemer v. United States*, 59 F.3d 26, 30 n.5

(5th Cir. 1995) (barring claim by wife of National Guard member for loss of consortium), *cert. denied*, 133 L. Ed. 2d 427, 116 S. Ct. 519 (1995); *De Font v. United States*, 453 F.2d 1239, 1240 (1st Cir. 1972) (barring claim by widow and child of servicemen for loss of companionship and support), *cert. denied*, 407 U.S. 910 (1972).

Several circuits have ruled that the *Feres* doctrine bars claims on behalf of the children of servicemen for birth defects, genetic damage, and cancer allegedly caused by the exposure of their parents to harmful agents during military service. *See In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 201 (2d Cir. 1987) (ruling that *Feres* doctrine barred claims by wives and children of servicemen exposed to Agent Orange during Vietnam War), *cert. denied sub nom., Adams v. United States*, 484 U.S. 1004, 98 L. Ed. 2d 647, 108 S. Ct. 695 (1988); *Hinkie v. United States*, 715 F.2d 96 (3d Cir. 1983) (barring claims by widow and children alleging that miscarriage and birth defects were caused by exposure of servicemen to radiation during active duty based on *Feres* doctrine), *cert. denied*, 465 U.S. 1023, 79 L. Ed. 2d 680, 104 S. Ct. 1276 (1984); *Mondelli v. United States*, 711 F.2d 567 (3d Cir. 1983) (barring suit by child of serviceman for genetic injuries allegedly caused by exposure of serviceman father to radiation on active duty under *Feres* doctrine), *cert. denied*, 465 U.S. 1021, 79 L. Ed. 2d 677, 104 S. Ct. 1272 (1984); *Lombard v. United States*, 223 U.S. App. D.C. 102, 690 F.2d 215 (D.C. Cir. 1982) (holding that action by former serviceman and his family for injuries sustained as a result of serviceman's exposure to radiation during atomic bomb project were barred by *Feres*); *Scales v. United States*, 685 F.2d 970 (5th Cir. 1982) (ruling that suit by minor child with congenital rubella syndrome allegedly due to negligent medical treatment received by servicewoman mother during basic training was barred under *Feres* doctrine), *cert. denied*, 460 U.S. 1082, 76 L. Ed. 2d 344, 103 S. Ct. 1772 (1983);

Monaco v. United States, 661 F.2d 129 (9th Cir. 1981) (holding under *Feres* doctrine that claim by child of serviceman for genetic injuries caused by exposure of serviceman father to radiation while in service were barred), *cert. denied*, 456 U.S. 989, 73 L. Ed. 2d 1284, 102 S. Ct. 2269 (1982); *Harten v. Coons*, 502 F.2d 1363 (10th Cir. 1974) (holding that *Feres* doctrine barred suit by serviceman and wife for costs of maintaining a child conceived after serviceman underwent elective vasectomy operation performed by military doctor), *cert. denied*, 420 U.S. 963, 43 L. Ed. 2d 441, 95 S. Ct. 1354 (1975).

In the pending case, Plaintiffs argue that there is a split of authority among the federal courts and urge this Court to allow their claims to go forward. Specifically, Plaintiffs rely on Judge Weinstein's initial opinion in *In re "Agent Orange" Prod. Liab. Litig.*, 580 F. Supp. 1242 (E.D.N.Y. 1984), the district court's decision in *Hinkie v. United States*, 524 F. Supp. 277 (E.D. Pa. 1981), then-Judge Ginsburg's dissent in *Lombard v. United States*, 223 U.S. App. D.C. 102, 690 F.2d 215, 227-34 (D.C. Cir. 1982), and the district court's initial decision in *C.R.S. v. United States*, 761 F. Supp. 665 (D. Minn. 1991).

The difficulty with Plaintiffs' reliance on these cases is that they are at best marginally persuasive. First, Judge Weinstein's opinion in *Agent Orange* and the lower court's opinion in *Hinkie* were overturned on appeal. *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 201 (2d Cir. 1987), *cert. denied sub nom. Adams v. United States*, 484 U.S. 1004, 98 L. Ed. 2d 647, 108 S. Ct. 695 (1988); *Hinkie v. United States*, 715 F.2d 96 (3d Cir. 1983), *cert. denied*, 465 U.S. 1023, 79 L. Ed. 2d 680, 104 S. Ct. 1276 (1984). Second, then-Judge Ginsburg's opinion in *Lombard* is merely a dissenting opinion. Finally, the decision of the United States District Court for the District of Minnesota in *C.R.S.*[4] is called into question by the fact

[4] *C.R.S.* involved claims by a former member of the National Guard, his wife, and their child alleging that they contracted

that the court allowed the serviceman to proceed on his own claim in contradiction to the clear holding of *Feres*. The persuasive value of the initial district court opinion in *C.R.S.* is further eroded by the fact that the district court later ruled that all of the claims against the United States were barred by the discretionary function exception to the FTCA. *C.R.S. v. United States*, 820 F. Supp. 449 (D. Minn. 1993). The Eighth Circuit upheld the district court's grant of summary judgment in favor of the United States based on the discretionary function exception without considering the earlier ruling on the *Feres* doctrine. *C.R.S. v. United States*, 11 F.3d 791 (8th Cir. 1993).

Plaintiffs also rely on *Romero v. United States*, 954 F.2d 223 (4th Cir. 1992), in which the United States Court of Appeals for the Fourth Circuit held that claims by parents and child for inadequate prenatal care provided by government doctors to a mother in active duty military service were not barred by the *Feres* doctrine. The Fourth Circuit distinguished between an independent injury to a civilian and a derivative injury, which is a "civilian injury that derives from a service-related injury to a service person." *Id.* at 226. In *Romero*, the court concluded that the civilian child suffered an independent injury. "Joshua, the civilian child, was injured, not a military patient. Admittedly, in satisfying its duty of care to Joshua, proper prenatal treatment would have involved his mother's body. The sole purpose of the treatment, however, would have been directed at Joshua." *Id.* at 225. "Joshua's injury did not derive from an injury suffered by a service member, but was caused when the government breached an affirmative duty of care owed directly to him." *Id.* at 226. In reaching its decision, the Fourth Circuit emphasized that "this suit will not require the

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Acquired Immune Deficiency Syndrome ("AIDS") due to the negligence of the United States in screening blood for human immunodeficiency virus ("HIV") and in failing to notify him that he received infected blood.

court to second-guess a decision of the military necessary to the accomplishment of a military mission." *Id.* at 226.

The birth defects and other injuries suffered by Plaintiffs in the pending case are predicated on the exposure of servicemen to drugs, pesticides, and other unreasonably dangerous and toxic products during their military service. No independent injury was involved.[5] The Plaintiffs did not have any treatment directed at them; the allegedly negligent acts or omissions of the government were directed at the servicemen and designed to advance the military's mission in the Persian Gulf War.

It is undisputed that any claims the servicemen might raise are barred by the *Feres* doctrine. It follows that the claims of the Plaintiffs which have their genesis in the barred claims of the servicemen are also barred by the *Feres* doctrine. If the claims of the Plaintiffs were allowed to go forward, this Court would be put in the intractable position of having to second-guess the decisions of the military in time of war. The Supreme Court has made clear that such second-guessing is to be avoided. *See Shearer,* 473 U.S. at 57. Accordingly, this Court is without subject matter jurisdiction to hear Plaintiffs' claims based on the *Feres* doctrine.[6]

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[5] The lack of physical manifestation of symptoms by the servicemen does not preclude the Court from finding that the Plaintiffs' injuries had their genesis in the exposure of the servicemen to allegedly dangerous products.

[6] In reaching this decision, the Court is not without sympathy for the suffering of the minor Plaintiffs and their current lack of a remedy, but the proper venue for the Plaintiffs to seek recompense is not the courts but Congress. As the Third Circuit noted:

> We sense the injustice to [the Plaintiff] of this result. Rarely does the law visit upon a child the consequences of actions attributed to the parents. Nevertheless, the Supreme Court has construed the FTCA to subordinate the interests of children of service personnel to the exigencies of military discipline. Although these are delicate policy judgments, they are in the final analysis committed to Congress. Consequently, we

B. Discretionary Function Exception.

Congress specifically excluded from the waiver of sovereign immunity in the FTCA "any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a) (emphasis added). The Supreme Court has recognized that this exception is intended to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *United States v. Varig Airlines*, 467 U.S. 797, 814, 104 S. Ct. 2755, 81 L. Ed. 2d 660 (1984).

In *Boyle v. United Technologies Corp.*, 487 U.S. 500, 101 L. Ed. 2d 442, 108 S. Ct. 2510 (1988), the Supreme Court found that "the selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function. . . . It . . . involves not merely engineering analysis but judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness." *Id.* at 511. Similarly, the decision of whether to administer drugs or vaccines to military personnel as a precaution against the use of chemical and biological weapons by enemy forces during armed hostilities is a discretionary function.

Plaintiffs cannot avoid the bar of section 2680(a) by casting their claims as a failure by the government to issue warnings of increased health risks. In *Maas v.*

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conclude, with reluctance, that the claims of [the Plaintiff] are barred.

Mondelli v. United States, 711 F.2d 567, 569-70 (3d Cir. 1983), *cert. denied*, 465 U.S. 1021, 79 L. Ed. 2d 677, 104 S. Ct. 1272 (1984).

United States, 94 F.3d 291 (7th Cir. 1996), the Seventh Circuit ruled that the decision whether to issue a post-discharge warning about the increased health risks from low level exposure to atomic radiation was a discretionary function. Specifically, the Court stated:

> In ascertaining the need for a warning and its cost, and in determining the group to be alerted, as well as the content and procedure for such notice, the government would balance safety with economic concerns. Deciding whether health risks justify the cost of a notification program, and balancing the cost and effectiveness of a type of warning, are discretionary decisions covered by § 2680(a).

Id. at 297. *See also In re Consol. United States Atmospheric Testing Litig.,* 820 F.2d 982, 997 (9th Cir. 1987) ("Any decision whether to issue warnings to thousands of [military nuclear weapons] test participants of possibly life-threatening dangers [of radiation exposure] and to provide them with appropriate examinations and counseling calls for the exercise of judgment and discretion at high levels of government."), *cert. denied sub nom., Konizeski v. Livermore Lab.,* 485 U.S. 905, 99 L. Ed. 2d 235, 108 S. Ct. 1076 (1988).

Plaintiffs in this case also argue that the discretionary function exception is not applicable because the negligence of the government occurred at an "operational" level rather than a "planning" level. The Supreme Court has rejected this distinction. "The distinction in *Dalehite v. United States,* 346 U.S. 15, 97 L. Ed. 1427, 73 S. Ct. 956 (1953), was merely [a] description of the level at which the challenged conduct occurred. There was no suggestion that the decisions made at an operational level could not also be based on policy." *United States v. Gaubert,* 499 U.S. 315, 326, 113 L. Ed. 2d 335, 111 S. Ct. 1267 (1991).

Deciding whether to establish a warning program related to the potential risk of birth defects or other adverse health effects associated with exposure to drugs, pesti-

cides, and other unreasonably dangerous and toxic products during military service in the Persian Gulf War is susceptible to policy analysis and judgment. Accordingly, the discretionary function exception in section 2680(a) bars this Court from exercising subject matter jurisdiction over Plaintiffs' claims including their claim that the military negligently failed to issue a warning.

C. Combat Activities Exception.

Congress specifically excluded from the waiver of sovereign immunity in the FTCA "any claim arising out of the combatant activities of the military or naval forces . . . during time of war." 28 U.S.C. § 2680(j) (emphasis added). This exception applies to claims arising out of the combatant activities of the military forces regardless of whether a formal declaration of war has been issued. *Koohi v. United States,* 976 F.2d 1328, 1333-34 (9th Cir. 1992), *cert. denied,* 508 U.S. 960, 124 L. Ed. 2d 679, 113 S. Ct. 2928 (1993). Therefore, even without a formal declaration of war, the Persian Gulf War constituted a "time of war" within the meaning of section 2690(j). *Id.* at 1334 ("No one can doubt that a state of war existed when our armed forces marched first into Kuwait and then into Iraq.").

The United States argues that the term "combat activities" includes "not only physical violence, but activities both necessary to and in direct connection with actual hostilities." *Johnson v. United States,* 170 F.2d 767, 770 (9th Cir. 1948) cited in *Koohi,* 976 F.2d at 1333 n.5. In contrast, Plaintiffs argue that the term "combat activities has been defined to mean 'the actual engaging in the exercise of physical force.'" *Skeels v. United States,* 72 F. Supp. 372, 374 (W.D. La. 1947).

In light of the applicability of the *Feres* doctrine and the discretionary function exception to the pending case, this Court need not speculate on the parameters of the combatant activities exception. Accordingly, this Court

expresses no opinions as to the proper definition of the term "combatant activities" or the applicability of the combatant activities exception.

D. Foreign Country Exception.

Under the FTCA, the liability of the United States is determined "in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346 (b). The waiver of sovereign immunity in the FTCA, however, does not extend to "any claim arising in a foreign country." 28 U.S.C. § 2680(k) (emphasis added). A primary purpose of this exception is to avoid subjecting the United States to liability depending on the laws of a foreign power. *United States v. Spelar,* 338 U.S. 217, 221, 94 L. Ed. 3, 70 S. Ct. 10 (1949).

The United States points out that even if the alleged negligence in this case had its operative effect in the United States when the children were conceived, the FTCA requires the Court to apply the law of the place where the negligent acts occurred. *See Heller v. United States,* 776 F.2d 92, 95-96 (3d Cir. 1985) (holding that foreign country exception barred wrongful death claim for negligent failure to diagnose cancer which occurred in Philippines even though decedent died in the United States), *cert. denied,* 476 U.S. 1105, 90 L. Ed. 2d 358, 106 S. Ct. 1948 (1986). Therefore, to the extent the alleged negligence occurred outside the United States, the foreign country exception is applicable.

Plaintiffs counter that the ordering, quality control, and administration of the immunization and pesticide programs were based in the United States. Plaintiffs also contend that the continuing negligent failure of the United States to warn the wives and children of the servicemen is occurring in the United States and not a foreign country. Whereupon, they conclude that the foreign country exception should not be construed as an absolute bar to their claims.

At this stage in the litigation, the Court must assume that the decision by the United States to utilize certain drugs, pesticides, and other unreasonably dangerous and toxic products may have occurred in the United States. Moreover, any omission with respect to a warning to the wives and children of servicemen would have occurred in the United States. Accordingly, the foreign country exception does not bar all of Plaintiffs' claims and cannot provide an adequate basis for granting the United States Motion to Dismiss.

III. MCA Claims

The Military Claims Act ("MCA") provides that the secretaries of the military departments "may" settle claims against the United States for, *inter alia,* personal injury or death caused by a civilian officer or employee of their department or a member of the Army, Navy, or Air Force acting within the scope of their employment, or otherwise incident to noncombat activities of their department. 10 U.S.C. § 2733. Such claim settlements are considered "final and conclusive" "notwithstanding any other provision of law." 10 U.S.C. § 2735.

While acknowledging that judicial review of MCA claims is "highly limited," Plaintiffs argue that courts may review questions of law such as whether a civilian's injuries were "incident to service." (Pls.' Mem. at 22). They rely exclusively on *Welch v. United States,* 446 F. Supp. 75 (D. Conn. 1978), in which the district court held that it could review whether the plaintiff's death was "incident to service." *Id.* at 78. The district court in *Welch* found that the "final and conclusive" language of section 2735 was designed to prevent federal executive agencies and officials from reviewing settlements but not to prevent judicial review. *Id.*

The great weight of authority addressing the MCA, however, holds that absent a constitutional violation, the disallowance of an MCA claim is not subject to judicial

review. *See, e.g., Collins v. United States,* 67 F.3d 284, 286-87 (Fed. Cir. 1995); *Schneider v. United States,* 27 F.3d 1327, 1331-32 (8th Cir. 1994), *cert. denied,* 513 U.S. 1077, 115 S. Ct. 723, 130 L. Ed. 628 (1995); *Hata v. United States,* 23 F.3d 230, 233 (9th Cir. 1994); *Rodrigue v. United States,* 968 F.2d 1430, 1434 (1st Cir. 1992); *Poindexter v. United States,* 777 F.2d 231, 233-34 (5th Cir. 1985); *Heller v. United States,* 776 F.2d 92, 98 (3d Cir. 1985), *cert. denied,* 476 U.S. 1105, 90 L. Ed. 2d 358, 106 S. Ct. 1948 (1986); *Broadnax v. United States Dep't of the Army,* 228 U.S. App. D.C. 354, 710 F.2d 865, 867 (D.C. Cir. 1983); *LaBash v. United States,* 668 F.2d 1153, 1155-56 (10th Cir.), *cert. denied,* 456 U.S. 1008, 73 L. Ed. 2d 1303, 102 S. Ct. 2299 (1982). In support of this rule, the United States Court of Appeals for the Federal Circuit has stated:

> The claim . . . was a military matter that required military discretion and expertise in its disposition. We are convinced that when Congress included the finality provision in the Military Claims Act it intended that army claims would be considered and disposed of by the army and not by the courts.

Collins, 67 F.3d at 287-88. More to the point of Plaintiffs' argument, the United States Court of Appeals for the Eighth Circuit ruled that "to interpret the section as precluding only further administrative review would be to render meaningless the phrase 'notwithstanding any other provision of law.'" *Schneider,* 27 F.3d at 1331.

Considering the weight of authority from the majority of federal circuits, the decision of the United States District Court for the District of Connecticut in *Welch v. United States,* 446 F. Supp. 75 (D. Conn. 1978), must be considered an aberration and no longer good law. Accordingly, because there is no allegation of a constitutional violation in the pending case, the Court is without jurisdiction to review the decisions of the Secretaries of the

Army and Navy as to Plaintiffs' claims for relief under the MCA.

IV. Venue

The United States challenges whether the United States District Court for the District of Maryland is a proper venue for adjudicating the claims of Kimberly Walsh and her minor child. Because this Court is without subject matter jurisdiction to hear any of the claims in these consolidated cases, it need not address the venue issue. *See Jeffrey Banks, Ltd. v. Jos. A. Bank Clothiers, Inc.*, 619 F. Supp. 998, 1001 n.7 (D. Md. 1985) ("When a motion under Fed. R. Civ. P. 12 is 'based on more than one ground, the court should consider the Rule 12(b)(1) challenge first since if it must dismiss the complaint for lack of subject matter jurisdiction, the accompanying defenses and objections become moot and need not be determined.' ") (quoting 5A FEDERAL PRACTICE & PROCEDURE § 1350, at 209-20 (1969)).

V. Conclusions

In accordance with the foregoing discussion, the Court will grant the United States' Motion to Dismiss Plaintiffs' FTCA claims for lack of subject matter jurisdiction because of the *Feres* doctrine and the discretionary function exception. The Court will also grant the United States' Motion to Dismiss Plaintiffs' MCA claims because judicial review of the decisions of the Secretaries of the Army and Navy with respect to Plaintiffs' MCA claims is expressly precluded by section 2735 of the MCA. Finally, the Court will not address the venue issue raised by the United States because the Court does not have subject matter jurisdiction to hear any of Plaintiffs' claims.

Joseph H. Young

Senior United States District Judge

ORDER

In accordance with the attached Memorandum, it is this 8th day of August 1997, by the United States District Court for the District of Maryland, ORDERED:

1. That Defendant's Motion to Dismiss for lack of subject matter jurisdiction BE, and the same IS, hereby GRANTED; and

2. That this action BE, and the same IS, hereby DISMISSED with prejudice; and

3. That a copy of this Memorandum and Order be mailed to counsel for the parties.

Joseph H. Young

Senior United States District Judge

APPENDIX C

[DoD Logo]

DEPARTMENT OF THE AIR FORCE
AIR FORCE LEGAL SERVICES AGENCY (AFLSA)

[14 Feb. 1996]

AFLSA/JACT
1501 Wilson Blvd., Rm. 835
Arlington, VA 22209-2403

Ken Pack, Esq.
Law Office of Peter Angelos
200 W. Pennsylvania Ave.
Towson, MD 21204

Re: Claim of Marilyn Minns, Individually and on Behalf of Casey Minns
Air Force Claim No. JACT 95-102

Dear Mr. Pack

I have considered the claim of Marilyn Minns, individually and on behalf of Casey Minns, for birth defects to Casey Minns allegedly caused by the service of Sergeant Brad A. Minns in the Persian Gulf conflict. While I sincerely regret the birth defects being suffered by Casey Minns, I must deny the claim.

I considered the claim under both the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680, and the Military Claims Act (MCA), 10 U.S.C. 2733. Under both statutes, there has been a failure to establish causation between Sergeant Minns' service in the Persian Gulf conflict and the birth defects of his child. As you are undoubtedly aware, no cause and effect relationship has yet been scientifically established between veterans of the conflict and birth defects in their offspring.

Under the FTCA, even if causation had been established, the claim is clearly barred by the doctrine set forth

in *Feres v. United States*, 340 U.S. 135 (1950). Pursuant to the precedent established in *Feres*, an active duty military member may not recover for injuries incurred incident to service. This also applies to injuries derivative of the servicemember—in this case, the unfortunate birth defects of Sergeant Minns' child. *In re "Agent Orange" Product Liability Litigation*, 506 F. Supp. 762 (E.D.N.Y. 1980).

Additionally, any injuries arising from inoculations Sergeant Minns received in the Persian Gulf area are excepted from the waiver of sovereign immunity of the FTCA under the foreign country exception. 28 U.S.C. 2680(k).

As to the Military Claims Act, the Act contains specific language that a member of the Army, Navy or Air Force may not recover for personal injury, when such injury is incurred incident to service. 10 U.S.C. 2733(b)(3). Under the regulations which are promulgated pursuant to the statutory language of the MCA (10 U.S.C. 2733(a)), the meaning and construction of the Act is a federal question to be determined by federal law. 32 CFR 842.51 (a)(4). The agency relies on the case law interpreting *Feres* as "an appropriate guide to the interpretation of the MCA's statutory exclusion." *Hata v. United States*, 23 F.3d 230, 234 (9th Cir. 1994). As claims derivative of a servicemember are barred under the FTCA by the *Feres* doctrine, they are also barred under the MCA's statutory exclusion for injuries incurred incident to service.

Additionally, any claims derivative of Sergeant Minns' service in the Persian Gulf conflict are barred by the discretionary function exception contained in the agency regulations implementing the MCA. 32 CFR 842.50(b).

Under the Military Claims Act, this is the final denial of the claim of Marilyn Minns, individually and on behalf of Casey Minns. However, if she so desires, she may ap-

peal this decision within a reasonable time, which is generally considered to be 60 days from the date of the mailing of this letter. No particular form is necessary, but the appeal should be in writing, describe the reasons for the appeal, and provide any additional evidence to substantiate the claim. Any appeal should be addressed to this office, at the address first appearing in this letter.

Also, I am obliged to inform you that under the Federal Tort Claims Act, this is the final denial of the claim of Marilyn Minns, individually and on behalf of Casey Minns. If she is dissatisfied with this decision, and believes she has a valid cause of action, she may now file suit in an appropriate United States District Court not later than six months after the date of mailing of this letter.

Sincerely

/s/ Carla S. Walgenbach
CARLA S. WALGENBACH
Lt Colonel, USAF
Chief, General & International Torts Branch
Tort Claims and Litigation Division
Air Force Legal Services Agency